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No. 87-154

In The
Supreme Court of the United States
October Term, 1987

JOSHUA DeSHANEY, a Minor, by his Guardian ad litem, and MELODY DeSHANEY,

Petitioners,

vs.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY; ANN KEMMETER and CHERYL STELSE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

I: Introduction

Respondents and their supporting amici focus their attention on broad general discussions about a general governmental duty to protect the public at large; then, having raised this strawman, proceed to destroy it. Petitioners urge the Court, however, scrupulously to focus on the exquisitely narrow issue presented by the facts of this case. While § 1983 cases in the protection area fall into a variety of categories, none is as narrow and as constitutionally compelling as this specific case, involving the protection of an infant from physical harm under circumstances where the County, in addition to having actual knowledge and a statutory duty, has actively undertaken his protection, and done so in a reckless and indifferent manner.[1]

The decisions which have found a constitutional deprivation, such as *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc) are predicated not simply on the "special or *other* relationship" analysis but, more importantly, the constitutional analysis involved when the state actively undertakes to protect a child from physical violence. This constitutional analysis recognizes the total vulnerability of children in our society and the primacy any organized society places on protecting helpless children. Respondents' assertion, Resp. Br. at 12, that " . . . there is no affirmative constitutional obligation on

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[1]Thus, cases cited by Respondents, such as *Turner v. United States,* 248 U.S. 354 (1919), dealing with a rejected Court of Claims petition for monetary compensation for property damaged by mob violence, stand on an entirely different footing.

the government to provide protective services" is factually irrelevant to this limited setting. This case concerns only constitutional liability in a child protection setting under specific facts where government defendants actively participated, with egregious failures, in such protection. Accordingly, this Court should resist Respondents' attempts to create a larger issue not truly present and the attempts by amici to speculate about the meaning of any decision in this particularized case in other societal settings.[2]

Petitioners agree with Respondents' brief (p. 14) that this case concerns the Due Process Clause and the framers' intention to prohibit "real *abuses* by state officials in the exercise of governmental power." *Parratt v. Taylor*, 451 U.S. 527, 549 (Powell, J., concurring) (emphasis in original). Accordingly, it appears the parties are in agreement that the specific facts in this case address themselves to the issue of whether there were real abuses[3]

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[2]In *Lassiter v. Department of Social Services*, 452 U.S. 18, 32 (1981), this Court in a family law due process setting directed trial judges to make such analysis by examining the "particular situation." This Court counselled against a generalized approach to resolving that due process issue in future settings.

[3]The Court of Appeals decision in this case found Respondent caseworker Ann Kemmiter reckless when she "inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. 44. Judge Posner for that same Court assumed that Respondents' failure to protect Joshua was sufficiently aggravated to escape the bar established by this court in *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986). Pet. App. 41.

by the Respondents in their exercise of governmental powers under the Wisconsin child protection statutes and thus a violation of the Due Process Clause.

II: The Importance of a Child's Safety and the Intimate Relationship Between an Endangered Child and a Child Protection Agency

Petitioners emphasize, Pet. Br. at 11-24, the constitutional considerations certain Courts of Appeals have undertaken respecting "special custodial *or other relationships* created *or assumed* by the State in respect to particular persons." *Taylor v. Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987) (en banc), pet. for cert. filed Dkt. No. 87-521, 56 U.S.L.W. 3290 (U.S. Sept. 25, 1987) (emphasis supplied).[4] A theme running through the constitutional analysis in these cases is the recognition that young children are the most vulnerable persons in any society. "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[5] The Respondents' reaction to such state child protection

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[4]Respondents nowhere in their 39 page brief mention or discuss this 1987 en banc circuit opinion. This Court should also be informed that last month—subsequent to the filing of Respondents' brief—the Ninth Circuit followed *Taylor* in *Balistreri v. Pacifica Police Department*, — F.2d —, No. 87-1969 (9th Cir. Aug. 23, 1988).

[5]A state's power vis a vis vulnerable children, whether characterized as a State's police power or parens patriae, is based primarily on the presumption that younger children lack the mental capacity and maturity to protect themselves. *See Wald, Children's Rights: A Framework for Analysis*, 12 U.Cal.D.L.Rev. 255-56, 262-63, 266-70, 273-74 (1979).

systems is set forth in their brief, Resp. Br. at 21. Quoting *Hewitt v. Helms,* 459 U.S. 460 (1983),[6] Respondents assert they should not be penalized for such a "desirable experiment" when child protection services undertaken are "imperfect." Respondents miss the issue; child protection is not merely "desirable," nor is it an experiment.[7] Child protection, under state statutes and the Constitution, is a reaction to "the demands of an organized society." *Youngberg v. Romeo,* 457 U.S. 307, 320 (1982). As such, courts must balance the liberty interests of parents to continued custody against the child's vulnerability and right to bodily integrity.[8]

In arguing against the invocation of the child's due process right in this context, amici suggest policy reasons for retrenchment. The City Management amici, whose members include state, county and municipal goverments, state at pp. 14-17 affirmatively that family law matters should be left to the states to resolve. Amici, following the attempt by Respondents, seek to expand and generalize the issues in this case by discussing generally family relationships and the need for family and juvenile courts. Whether the due process clause is substantively implicated in a physical child abuse situation where the government has, over two years, actively exercised power, knows the child is being abused, knows it is his sole protector, and believes he will be killed, is again the narrow issue facing

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[6]This Court's *Hewitt* decision had nothing to do with children, the potential for physical harm, or an individual's need for physical protection.

[7]See footnote 15 *infra*.

[8]*Infra,* 13-15, for further discussion of this constitutional due process balancing.

the Court in this case. It takes no particular expertise to determine that abundant direct evidence of multiple acts of physical abuse warrants due process. One need only examine the child abuse due process cases from the lower federal courts to ascertain that this aspect of the analysis is not difficult. Indeed, in this case Judge Posner articulated no difficulty in concluding the facts were sufficiently aggravated to escape the bar of *Daniels* when he examined the "mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. 44.

The Court in *Ledbetter* so analyzed the 14th Amendment in the child protection context:

> "The fourteenth amendment, like the eighth amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds." 818 F.2d at 797 (citation omitted).

III: The Argument of Liability Only for "Active" Abuses of Power Should Be Rejected

A) The Caselaw Does Not Support the Argument

Respondents attach significance to their "actively inflicted" constitutional characterization. Resp. Br. at 15-23. For example, "This active infliction requirement—com-

mon to both state action under the Fourteenth Amendment and causation under Section 1983—is especially important in a case such as this, where government services have been provided but are argued to have been inadequate." Resp. Br. at 21. Respondents ignore the fact that decisions from this Court under § 1983, aside from active infliction of injury, have frequently noted that neglect or misuse or failure to act may constitute an unconstitutional abuse of power.

> It is abundantly clear that one reason the legislation [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect,* intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Monroe v. Pape,* 365 U.S. 167, 180 (1961) (emphasis added).

The First Circuit in *DiMarzo v. Cahill,* 575 F.2d 15, 18 n. 3 (1st Cir. 1978), *cert. denied,* 439 U.S. 927, similarly interpreted § 1983 based on *Monroe*:

> [T]he Civil Rights Acts of 1871 were intended to safeguard constitutional rights which state authorities might deny by neglecting to enforce state statutes as well as by more affirmative action . . . Failure to act where there is a duty to act can give rise to an actionable claim under section 1983.[9]

This year in *Felder v. Casey,* 108 S.Ct. 2302, 2307 (1988), this Court reaffirmed § 1983 and noted again

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[9]*Monroe v. Pape, supra,* also analyzed sec. 1983 as a Congressional intent to enforce the Fourteenth Amendment against state officials "whether they act in accordance with their authority or misuse it." *Id.* at 172.

> that it provides " 'a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the nation,' and is to be accorded 'a sweep as broad as its language.' " (citations omitted.)

Respondents resist the very narrow issue and facts in this specific case; the constitutional deprivation due process issue here revolves around the protection of children from violence, and that issue alone is present. For example, the City Management amici (p. 5) are simply wrong in asserting, "there is no principled basis for distinguishing child welfare services from other protective services."[10] These assertions by Respondents and amici are too sweeping and again fail to recognize that the core concern of protecting children from physical violence constitutes a paramount concern. The fact that this Court has granted respect to parents in the realm of their decision making for their children vis a vis medical care, education, and the like is to be clearly distinguished from issues in the realm of parents physically abusing their vulnerable children. If it is true that under *Daniels,* 474 U.S. at 329-332, abuse of power is the core value of the Due Process Clause, then a State abusing its power to protect such vulnerable children strikes at that core value.

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[10]The same amici at p. 2 throw down the gauntlet, asserting a finding of liability in this case would force federal courts to address child abuse and an issue that is the "recognized province of state and local governments." Wrong. The same alarm was sounded when the unconstitutional use of law enforcement force—an abuse of power—first surfaced in federal courts over two decades ago. In the same manner, the amicus brief in support of Respondents by the State of New York, et al., asserts at p. 13 there should be special and required deference to parental decision making in this area.

B) The Legislative Hostory of § 1983 Negates The "Action/Inaction" Dichotomy Claimed By Respondents.

Respondents assume and then assert as fact that the 14th Amendment and its legislative enforcement in § 1983 were intended solely to address instances of "active infliction" by states. They refer, Resp. Br. at 18, and notes 12 and 14, to this Court's discussion of the debates on the predecessor to § 1983 in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and the Solicitor General's Brief (p. 12) makes a similar suggestion. Neither, however, addresses the legislative debate directly.

Respondents' historical assertion is erroneous, and is refuted by a conscientious examination of the legislative history. Petitioners submit with this Reply Brief, as a Special Appendix[11], a scholarly review of the Congressional debates on the original H.R. 320 (now, § 1983) in the 42nd Congress, written by Professor Edward Keynes of Penn State University (unpublished, 1988) entitled "The Fourteenth Amendment, 42 U.S.C. § 1983, and State Inaction: Did The Authors of The Enforcement Act of 1871 Intend Civil Liability for the States' Failure to Protect Individual Rights." This appears to be the first scholarly examination of the original records in the context of the "action vs. omission" question. As the paper and its examination of the Congressional debate amply demonstrate, both the proponents and the op-

[11]For clarity, this Special Appendix is page-numbered App. 15, ff., to preclude confusion with the Wisconsin statutory material appended to Petitioners' initial Brief at pages App. 1 through App. 14.

ponents of H.R. 320 recognized, *and consciously intended*, that redress would be afforded not merely for "bad acts" but for the *failure to enforce* constitutional rights. Indeed, the *omissions* of constitutional protection commonly occuring during Reconstruction were a *primary* aim of the bill, not a mere side issue.

The bill's opponents argued, as do Respondents here, that the federal government's authority was limited to preventing the states from actively depriving persons of life, liberty and property without due process of law. (Special Appendix, at App. 31). This view was rejected by the Congress (Special Appendix, at App. 22-41) and should be rejected by this Court.

IV: Wisconsin Child Protection Statutes in Chapter 48 Provide Additional Support for the Existence of a Liberty or Property Interest

Respondents argue the *Board of Regents v. Roth*, 408 U.S. 564 (1972) entitlement issue is not properly before this Court. Resp. Br. at 26-29. Factually, however, Petitioners' Complaint (para. 46, J.A. 11) specifically referenced the provisions of Sec. 48.891, Wis. Stats. 1981-1982. Further, respecting the references to state law by the Court below and the manner in which this issue factually and legally flows from substantive due process, the "mere enlargement" rule should logically permit resolution. *See* ***Dewey v. Des Moines***, 173 U.S. 193, 198 (1899).

Petitioners relied heavily in their initial Brief on the Eleventh Circuit's en banc decision in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). (Strikingly, Respondents' Brief omits any reference to *Taylor* whatever). It is

significant to note that the *Taylor* court found the *Roth* argument meritorious. The court en banc carefully scrutinized a Georgia child protection statutory scheme and noted the mandates present therein and the affirmative duties placed on government officials to protect children. In this case, Wisconsin Statutes are similarly mandatory. For example, beyond general legislative aims to provide for the care and protection of children, Sec. 48.01(1)(b); to respond to children's need for care and treatment, Sec. 48.01(1)(e); providing for liberal construction to effect its objectives, and for the best interests of the child to be of paramount consideration, Sec. 48.01(2), the statute specifically mandates that social workers and others with reasonable cause to suspect child abuse *shall* report such, Sec. 48.981(2); persons required to report, such as social workers, *shall* immediately contact designated officials, Sec. 48.981(3); County DSS upon receiving a report *shall* commence an appropriate and thorough investigation within twenty-four hours, Sec. 48.981(3)(c); and a DSS investigator having grounds *shall* place the child in protective custody, Sec. 48.891(3)(c)(5). These acts are not elective, but mandatory; the mandate goes not to how "perfectly" they are carried out, but to the stark obligation to perform them. In this case, factually, these unequivocal mandates were ignored, and ignored repeatedly. It is not simply that they were done poorly; rather, they were not done at all, and were omitted without excuse or sense.

The Wisconsin child protection statutes manifest a directive that meaningful, effective child protection *shall* be carried out; that responsible reports of child abuse

shall be investigated, appropriately, thoroughly and timely; and that evidence of endangerment *shall* be acted on, effectively. The State articulated the mandatory aspects of a liberty interest which is protected by the 14th Amendment; the child's right to this protective service exists, and substantive due process compels protection of that right. *Taylor v. Ledbetter*, 818 F.2d at 798-800.

V: The Defense of Qualified Immunity Is Not Before This Court

Respondents argue, Resp. Br. at 37-38, for this Court to review and then dismiss this action based upon the claim of a qualified immunity they say is available to the individual Respondents.[12] This argument was not raised by the Respondents before the district court or the Seventh Circuit.

Any examination of this issue, although now premature, would reveal the fact that a special or other noncustodial relationship had been articulated as a due process constitutional right precipitant in the Seventh Circuit years earlier. *See White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In the child protection context predating the facts herein, *see Doe v. New York Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981).

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[12]Amici City Management in its Brief at pp. 25-26 takes a comparable position. The amicus brief of the six states takes a contrary position (pp. 6-11), asserting that such individual respondents have absolute immunity from liability for money damages. This claim is refuted by this Court's analysis in *Malley v. Brigges*, 475 U.S. 335, 342-43 (1986).

The position asserted by Respondents is laid to rest, moreover, by the recent analysis by Chief Judge Winter for the Fourth Circuit in *L.J. by and through Darr v. Masinga,* 838 F.2d 118, 122 (4th Cir. 1988).

VI: Respondents' Position Would Graft An Unnecessary "State of Mind" Requirement Onto Due Process Protections

Respondents disingenuously seek to graft another requirement, a state of mind requirement, onto § 1983 liability. Resp. Br. at 30-34. These efforts were rejected by the court below, for good reason, as it recognized the recklessness employed by Respondents and particularly Respondent Kemmeter. The court accepted that Respondents' failures were sufficiently egregious to escape the bar of *Daniels,* 474 U.S. 327 (1986) and *Davidson,* 474 U.S. 344 (1986).

Respondents' decision to focus on a "state of mind" requirement seems especially inappropriate in view of Respondent Kemmeter's comment that "I just knew the phone would ring some day, and Joshua would be dead." J.A. 107-108.

This Court has not retreated from its 1961 holding in *Monroe v. Pape,* 365 U.S. 167, 180, that § 1983, unlike 18 U.S.C. 242, has no state of mind requirement. *See Parratt*

v. Taylor, 451 U.S. 527, 534-535 (1981). In *Daniels, supra,* the Court made clear that it had not abandoned its view: "We adhere to that conclusion." 474 U.S. at 330.

The Ninth Circuit has recently scrutinized *Daniels* and *Davidson* to determine whether they impose scienter or other culpability requirements superceding the balancing standard of review appropriate under *Youngberg v. Romeo,* 457 U.S. 307 (1982). In *Estate of Connor v. O'Connor,* 846 F.2d 1205 (9th Cir. 1988), the court held that *Youngberg* had not been vitiated by *Daniels or Davidson. See Taylor v. Ledbetter, supra.*

VII: The "Razor's Edge" Argument Is Misplaced and Does Not Fit the Reality of Constitutional Child-Protection

The Court below asserted that acknowledging liability in even such aggravated circumstances as those present here would place welfare departments "on the razor's edge." Pet. App. at 44-45.[13] Respondents make a similar argument, Resp. Br. at 8, 26,[14] and suggest a flood of liti-

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[13]*See* Posner, *Wealth Maximization Revisited,* 2 Notre Dame J.L. Ethics & Pub. Pol'y 85 (1985) ("Wealth maximization as ethically attractive norm for social and political choices.")

[14]Similarly, the Solicitor General in his amicus brief at p. 13 n.4 imagines the "enormous economic consequences" flowing from the due process right asserted by petitioners herein. The City Management amicus brief at p. 19 imagines that the financial consequences of liability in this case could substantially impair if not destroy foster care service in many states. The

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gation would follow a recognition by this Court of duty and liability in this case.

This claim is unwarranted legally and factually. Factually it assumes that the only two alternatives in existence are to remove the child and terminate all parental rights or abandon the child to the fury of the abusive parent, ignoring the vast array of less-intrusive intermediate options available. Legally, it forgets that under *Daniels* and *Davidson, supra,* there can be *no* liability to anyone, parent or child, for negligence. Under those cases no liability can exist anywhere in the broad middle range of "which way shall we go in this case" situations. Far from being in a "damned-if-we-do, damned-if-we-don't" dilemma, the caseworker and the department are already afforded strong, broad protection, so that only a termination decision prompted by spite and malice, or a "refusal to protect" decision spawned by the most egregious neglect

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amicus brief from the six states as amici hypothesized that liability would unfairly burden social service professionals with the potential for liability and do so in an area of the law where courts would, as a practical matter, be unable, through lack of confidence, to arrive at proper decisions. As to this latter argument, the states amici, pp. 13-15, cite, for example, the fact that no consensus exists in the educational field on the appropriate way to educate children. This latter argument is sophistry, as we are focusing on a very narrow and clear issue, viz. the prevention of physical violence against children. Although it takes careful scrutiny when evidence is presented in a case like this, it requires no special judicial training to conclude, as did Judge Posner below, that the respondent caseworker exhibited recklessness "when Ann Kemmeter inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father." Pet. App. at 44.

and indifference (such as are present in the facts of this case), can give rise to liability; *the entire middle range is free of liability, even where tragic results ensue.* The razor's edge literally does not exist.

If there is to be a balancing of the constitutional rights of endangered and abused children against parental rights (which have never been deemed to include a right to commit abuse upon a child), we should at a minimum recognize the extent of the problem and its effects. The reality is that children are increasingly facing violence at the hands of their parents and guardians.[15] Respondents here, and others in their position, have a critical responsibility to their young clients, and must recognize that this duty of protection is primary; their other duties, however worthy, are secondary.

This Court's recognition of Respondents' duty, and corresponding liability in extreme instances of refusal to protect children known to be abused, will strike an appropriate balance among arguably competing interests; to refuse that recognition in even the most extreme instance would leave the battered child and his rights entirely out of the equation.

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[15]*See,* e.g., Myers, *The Legal Response to Child Abuse: In the Best Interests of Children?,* 24 J.Fam.L. 149, 164-169 (1985-86); Cole, *Religious Confidentiality and the Reporting of Child Abuse: A Statutory and a Constitutional Analysis,* 21 Col.J. of L. & S. Prob.1, 3-5 (1987); Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspective,* 50 N.C.L. Rev. 293 (1972).

CONCLUSION

A fair view of the constitutional rights of endangered children, shared by all of the appellate courts which have considered these questions except the court below, demonstrates that Joshua DeShaney enjoyed protected constitutional rights which were egregiously violated by Respondents.

The decision below should be reversed and the matter remanded for trial upon the merits of the case.

Respectfully submitted,

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THE FOURTEENTH AMENDMENT, 42 U.S.C. § 1983, AND STATE INACTION

Did The Authors of The Enforcement Act of 1871 Intend Civil Liability for The States' Failure to Protect Individual Rights*

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September 5, 1988

In a series of decisions beginning with *Monroe v. Pape* (1961),[1] the Supreme Court has addressed the vexing problem of the states' liability for civil damages for violations of individuals' fourteenth-amendments rights.[2]

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* The author is indebted to Mr. Jack Sulzer, Librarian, Government Documents Section, The Pennsylvania State University Libraries, University Park, Pennsylvania, and Mr. Chris Wright, Librarian, Loans Department, the Library of Congress, Washington, D.C., for their generous and timely assistance in obtaining the legislative record, including the various versions of H.R. 320 and its amendments, 42d Congress, 1st session (1871). He is also indebted to Ms. Jennifer A. Toelke, Mr. Warren R. Mowery, Jr., and Mr. Richard M. Kerns for their research assistance. The author thanks Mr. Stephen M. Krentzman for proofreading the manuscript. Finally, he thanks his computer genie, Mrs. Barbara Ayala, for producing the final manuscript.

[1]365 U.S. 167

[2]Of course, the Eleventh Amendment immunizes the states from liability for damages under § 1983. But a state, municipalities, other political subdivisions, and their agents may be defendants under § 1983.

In the following decisions, the Court has examined state actors' liability for civil damages under § 1983: *Paul v. Davis*, 424 U.S. 693 (1976); *Estelle v. Gamble*, 429 U.S. 97 (1976); *In-*

(Continued on following page)

Specifically, these decisions examine the constitutional liability of states, municipalities, other political subdivisions, and their personnel under 42 U.S.C. § 1983 (hereinafter § 1983) for damages for violation of the individual's judicially defined rights to due process and equal protection.[3] While the Fourteenth Amendment clearly prohibits the states from taking positive actions that deprive due-process and equal-protection rights, more recently, some scholars[4] and federal-court decisions suggest that various forms of omission or inaction are also destructive of these judicially protected rights. Generally, these decisions determine state governmental liability by importing standards of tort liability into the Fourteenth Amendment[5] rather than articulating a satisfactory theory of constitutional lia-

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graham v. Wright, 430 U.S. 651 (1977); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978); *Baker v. McCollan*, 443 U.S. 137 (1979); *Martinez v. California*, 444 U.S. 277 (1980); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Brandon v. Holt*, 469 U.S. 464 (1985); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Malley v. Briggs*, 475 U.S. 335 (1986); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

[3]On municipal liability for employees' actions in § 1983 suits, see *Hutto v. Finney*, 437 U.S. 678 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Brandon v. Holt*, 469 U.S. 464 (1985); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

[4]See, for example, Heinzerling, Lisa E., "Actionable Inaction: Section 1983 Liability for Failure to Act," 53 *Univ. of Chicago L. Rev.* 1048-1073 (1986).

[5]*Id.*, at 1061-63.

bility based on the language, logic, and legislative history of the Fourteenth Amendment and section 1 of the Enforcement Act of 1871 (§ 1983), which the 42d Congress enacted to enforce the provisions of section 1 of the Fourteenth Amendment.[6]

Both the framing of the Fourteenth Amendment and § 1983 suggest that the states have an affirmative duty to protect the individual's right to due process and equal protection,[7] despite the negative formulation of the due process and equal protection clauses and § 1983. If the states fail to meet their affirmative duties, Congress has authority (under § 5 of the Fourteenth Amendment) to redress the states' failure through remedial legislation (e.g., § 1983). Furthermore, if the states have an affirmative duty to protect, conversely, inaction may imply a constitutional liability under § 1983.[8] Admittedly, not every failure to act deprives an individual of her or his fourteenth-amendment rights. Therefore, it is imperative to begin this inquiry by defining the scope of the rights that the Fourteenth Amendment (§ 1) encompasses.

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[6]Ch. 22, 17 Stat. 13 (1871), codified as amended at 42 U.S.C. 1983 (1981).

[7]Curtis, Michael Kent, *No State Shall Abridge: The Fourteenth Amendment and The Bill of Rights* (Durham, N.C.: Duke Univ. Press, 1986).

[8]See *Estate of Bailey ex rel. Oare v. County of York*, 768 F.2d 503, at 510-511 (3rd Cir. 1985), and, by dictum, *Jensen v. Conrad*, 747 F.2d 185, at 190-194 (4th Cir. 1984). But see *Estate of Gilmore v. Buckley*, 787 F.2d 714, at 721-722 (1st Cir. 1986); *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, at 926 (8th Cir. 1987); *Wideman v. Shallowford Community Hosp., Inc.*, 826 F.2d 1030, at 1035-1036 (11th Cir. 1987); *Archie v. City of Racine*, 847 F.2d 1211, at 1223 (7th Cir. 1988).

The Fourteenth Amendment resulted from an evolutionary process of legislative bargaining and compromise among diverse and conflicting factions in the 39th Congress (1866)—among northern Democrats and radical, moderate, and conservative Republicans. There is no singular, collective intent; rather, the Fourteenth Amendment reflects the diverse intentions of its proponents and opponents. While the radicals (including Representative Jonathan Bingham, a principal draftsman of § 1) believed that the proposed amendment incorporated natural or fundamental rights and liberties (terms that members used interchangeably), some moderate Republicans argued that the amendment incorporated only those rights that the old Constitution comprehended. From the moderates' perspective, the proposed amendment merely applied constitutional limitations to the states, thus, overcoming the Supreme Court's decision in *Barron v. Baltimore.*[9] Conservative Republicans and northern Democrats generally argued that the proposed amendment merely constitutionalized the limited rights that Congress conferred in the Civil Rights Act of 1866.[10]

Assuming the narrowest construction of congressional intent, namely, that the Fourteenth Amendment merely constitutionalized the Civil Rights Act of 1866,[11] what re-

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[9]32 U.S. (7 Pet.) 243 (1833).

[10]See Curtis, n. 7 *supra,* for an analysis of the various members' positions on § 1 of the Fourteenth Amendment. But see Berger, n. 11 *infra,* for a countervailing interpretation.

[11]Berger, Raoul, *Government by Judiciary: The Transformation of The Fourteenth Amendment* (Cambridge, Mass.: Harvard

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sponsibilities does § 1 impose on the states? Section 1 of the Act provides:

> That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property,* as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding (emphasis added).[12]

At the core of rights that section 1 of the Act protects is a person's physical security and property (today, property interests). Section 1 of the Act and the Fourteenth Amendment also guarantee equality of legal treatment regarding life, liberty, and property. Section 1 of the Act defines the substantive and procedural rights that citizens of the United States shall (imperative)[13] enjoy and enjoins the states from interfering with the enjoyment of such

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Univ. Press, (1977). But see M. Curtis, n. 7 *supra.* Even if one assumes that Berger is correct, according to Charles Shattuck, the Framers of the Fourteenth Amendment understood the term "liberty" to comprehend personal liberty, i.e., the individual's security and freedom from unlawful restraint. See Shattuck, Charles E., "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property'," 4 *Harv. L. Rev.* 365-392 (1891).

[12]Ch. 31, 14 Stat. 27 (1866), at 27.

[13]*West's Words and Phrases,* Vol. 39 (St. Paul, Minn.: West Pub. Co., 1953), at 111, 123.

rights. Although section 1 refers to various positive deprivations, it does not preclude deprivations arising from omissions or inaction, i.e., failure to protect.

While the rules of statutory construction require strict fidelity to statutory language, the rules of constitutional construction give the Court greater latitude in determining the intent of Congress in framing the Fourteenth Amendment. In the several stages of drafting the Amendment, a change occurred in the language of section 1. The early drafts incorporated positive or affirmative language,[14] while the final draft defined the states' responsibility in negative terms.[15] Since the federal courts have emphasized

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[14]On January 27, 1866, Bingham first proposed language granting Congress affirmative power to protect the person's life, liberty, and property:

> Congress shall have power to make laws which shall be necessary and proper to secure to all persons in every State full protection in the enjoyment of life, liberty and property; and to citizens of the United States in every State the same immunities, and equal political rights and privileges.

On February 3rd, Bingham proposed the following amendment as a substitute for the January 27th resolution:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

See Kendrick, Benjamin B., *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867; Columbia University Studies in History, Economics and Law Public Law*, Vol. 62 (New York: Columbia Univ. Press, 1914), at 60, 61.

[15]On April 28, 1866 Representative Bingham offered the following substitute for the language of § 1:

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the negative language of the amendment, it is important to determine whether the change in language implied a change in meaning or intent, i.e., whether the states' duty is affirmative or negative.

Despite its negative formulation, section 1 of the Fourteenth Amendment implies an affirmative governmental duty to secure the individual's right (legal entitlement) to due process and equal protection. Section 1 does not merely enjoin government from taking actions that abridge these rights.[16] Circuit Judge Easterbrook's opinion in *Archie v. City of Racine* to the contrary notwithstanding, the Fourteenth Amendment is more than "'a charter of negative rather than positive liberties.'"[17] The Fourteenth Amendment is a reflection, in part, of the natural-rights thinking that motivated its sponsors rather than the laissez-faire economic and political thought that influenced the Court in the latter part of the nineteenth century.[18]

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> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

See Kendrick, n. 17 *supra*, at 106

[16]See Soifer, Aviam, "Protecting Civil Rights: A Critique of Raoul Berger's History" 54 *N.Y.U. L. Rev.* 651-706 (1979).

[17]847 F.2d 1211, at 1220 (7th Cir. 1988), quoting from *Jackson v. City of Joliet*, 715 F.2d 1200, at 1203 (7th Cir. 1983).

[18]ten Broek, Jacobus, *Equal Under Law* (New York: Collier Books, 1965), at 21, 51, 52, 53-54, 190, 191; M. Curtis, n. 7 *supra*, at 54, 129-130; A. Soifer, n. 19 *supra*, at 704-705; Kelly, Alfred H., "The Fourteenth Amendment Reconsidered: The Segregation Question," 54 *Mich. L. Rev.* 1049-1086 (1956), at 1052-53.

Representative Bingham's early drafts of § 1 imposed an affirmative duty on Congress to enforce its provisions.[19] Bingham's early drafts would have made the enforcement of § 1 entirely dependent on congressional action. Bingham's later drafts and the final version shifted the affirmative congressional duty to the states, but granted Congress power to enforce § 1 rights in the event that the states failed, were unable, or refused to enforce its guarantees.[20] Section 1 also permitted Congress to adopt remedial legislation in the event that the states actively interfered with the individual's rights. However, the authors of § 1 never clarified the distinction between state action and inaction. Although the record is silent, the Court has chosen to give a limited meaning to "state action" (under § 1) and a narrow, remedial scope to congressional authority (under § 5).

Despite the Court's subsequent narrow construction of "state action" and congressional authority, the legislative history of the Enforcement Act of 1871 suggests that Congress had a broad rather than a narrow conception of its authority to enforce the citizen's fourteenth-amendment rights. In the face of continuing deprivations of the Freedman's constitutional rights, Congress enacted the Civil Rights Act of 1871 (the Enforcement Act). Confronted with the southern states' failure to enforce the Fourteenth Amendment's guarantees of due process and equal protection, Congress established civil liability for:

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[19]See n. 17 *supra*.

[20]See n. 18 *supra*, and Kendrick, *The Journal of the Joint Committee on Reconstruction*, at 116.

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States . . . .[21]

As the legislative record indicates, Congress was concerned with the failure of the states or their agents to protect the individual's constitutional rights as well as the states' active deprivation of such rights.

Considered in the historic context of Reconstruction, the Enforcement Act of 1871 explicitly recognized the states' failure to protect the individual's constitutional rights, provided various remedies for state deprivations, including the use of military force,[22] suspension of the privilege to the writ of habeas corpus,[23] expansion of the federal courts' jurisdiction, and federal civil and criminal remedies.[24] Given the historic context and Congress' remedial intent, what constitutional rights does the Act encompass? And, did Congress intend to cover the failure (omission) to protect the individual's rights as well as the active deprivation of these rights by the states and their agents (i.e., persons acting under color of law, etc.)?

Since there was virtual consensus on § 1 of the Act, neither the House of Representatives nor the Senate debated this provision extensively. And, the language of § 1

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[21]Ch. 22, 17 Stat. 13 (1871), at 13.

[22]*Id.*, § 3, at 14.

[23]*Id.*, § 4, at 14-15.

[24]*Id.*, § 2, at 13-14.

does not elucidate the problem. Therefore, it is necessary to refer to the language and consideration of the Act's other provisions in order to determine congressional intent. Section 3, which concerns insurrection, domestic violence, unlawful combinations, and conspiracies that deprive persons of their constitutional rights, specifically addresses the failure of state authorities to protect the individual's rights. In the event that:

> the constituted authorities of such State shall either be unable to protect; or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States[.][25]

Although Congress rejected Senator Sherman's amendment to H.R. 320 (the Enforcement Act of 1871), which would have established municipal corporate liability for private deprivations of constitutionally protected rights,[26] both the language of the proposed amendment and the tenor of the debate suggest that the members of the House and, to a lesser degree, the Senate contemplated the failure of public agents to protect the individual's rights. Despite congressional rejection of municipal corporate liability for private, riotous deprivations,[27] the Act included § 1 of H.R. 320, virtually as introduced, which

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[25] *Id.*, § 3, at 14.

[26] 42d Cong., 1st Sess. (1871).

[27] On April 19th the House refused to accept the first conference committee's report, which included the Sherman amendment. Cong. Globe 800-801 (April 19, 1871) (vote: yeas 74, nays 106, not voting 50).

made public agents liable for their deprivations of constitutional rights.[28] However, throughout the debate on Sherman's amendment, § 1 of the bill, and the other provisions of H.R. 320 there is no evidence to suggest that Congress rejected the concept of state agents' liability for their failure to protect the individual's constitutional rights. Indeed, there is ample evidence in the House and Senate debates to demonstrate that the bill's proponents and opponents, alike, contemplated inaction as well as action.

When the House of Representatives took up H.R. 320, on March 28, 1871, Mr. Shellabarger (R.-Ohio), the bill's floor manager, immediately addressed the scope of the rights and the judicial remedies that § 1 incorporated. In addressing these issues, he referred to the Civil Rights Act of 1866.[29] Undoubtedly, this Act (see App. 20 *supra*) encompassed the person's physical security and property. Other Republican representatives, who supported H.R. 320, echoed Shellabarger's views. Quoting from Mr. Justice Washington's opinion in *Corfield v. Coryell*, on March 29th, Representative George Hoar (R.-Mass.) noted that Congress had authority, under the Fourteenth Amendment, to protect the privileges and immunities of citizenship, including:

> the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government

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[28] 42d Cong., 1st Sess. (1871).

[29] Cong. Globe 317 (March 28, 1871) (statement of Rep. Shellabarger).

may justly prescribe for the general good of the whole.[30]

The next day, March 31st, Representative James Monroe (R.-Ohio) emphasized that:

> A constitution is a means, and not an end. Life, liberty, and happiness do not exist for the sake of the constitution, but the constitution exists and was framed for their sake. In interpreting the constitution of any great, free country there is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and Governments exist.
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> When, therefore, occasions arise in which life, liberty, and property require new guarantees for their security, members of a legislative body are not to be repelled by mere novelty in the details of a bill like this from a candid examination of it.[31]

And, in examining the constitution, Monroe found warrant for the proposed Enforcement Act of 1871.[32]

Immediately thereafter, Mr. Lowe (R.-Kan.) noted that, if government could not protect the citizen's right to life and liberty, civil government had failed to perform its fundamental responsibility. Supporting the proposed act, Lowe concluded, "[t]he cardinal doctrine of our institutions is that all citizens are equal before the law, and

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[30] *Id.*, at 334 (March 29, 1871) (statement of Rep. Hoar).

[31] *Id.*, at 370 (March 31, 1871) (statement of Mr. Monroe).

[32] *Id.*

that the law shall equally secure to all, their natural and inalienable rights.'"[33]

On April 1st, two other proponents of H.R. 320, Representative Hawley (R.-Ill.) and Representative Rainey (R.-S.C.) addressed the rights that §1 of the bill covered. While Hawley emphasized that § 1 covered only constitutionally protected rights, both Hawley and Rainey understood these rights to include the protection of life, liberty, and property.[34] In a powerful concluding statement, Representative Rainey noted:

> If the Constitution which we uphold and support as the fundamental law of the United States is inadequate to afford security to life, liberty, and property—if, I say, this inadequacy is proven, then its work is done, then it should no longer be recognized as the Magna Charta of a great and free people[.][35]

Two days later, on April 3rd, § 1 received attention, once again, when Representative John Beatty (R.-Ohio) observed that a basic purpose of H.R. 320 was to promote the equal protection of the law.[36] Beatty stressed that the bill protected only federal constitutional rights, but he failed to define those rights. In contrast to Beatty's cautious approach, on April 4th, Ben Butler (R.-Mass.) offered an expansive interpretation of the rights that § 1 included. Given to hyperbole, Butler remarked:

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[33] *Id.*, at 374 (March 31, 1871) (statement of Rep. Lowe).

[34] *Id.*, at 380, 395 (April 1, 1871) (statements of Rep. Hawley and Rep. Rainey).

[35] *Id.*, at 395 (statement of Rep. Rainey).

[36] *Id.*, at 428 (April 3, 1871) (statement of Rep. Beatty).

> If the General Government has not the constitutional power to protect the lives, liberty, and property of its citizens upon its own soil when such protection is needed, then it ought to have such power; it should reside somewhere in the Government. For without the power to protect the lives of its citizens, a republican government is a failure, and if such be constitutional law, to be a citizen of the United States is to be the most unprotected of all mankind.[37]

However, Butler did not doubt congressional power to protect life, liberty, and property in the states.

During the next two days of floor debate, April 5th and 6th, Republican proponents of H.R. 320 continued to focus on the rights that § 1 encompassed. Stressing the bill's comprehensive scope, Representative Henry Dawes (R.-Mass.) stated:

> No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty, and pursuit of happiness of every citizen of this Republic.[38]

Dawes then observed that the first remedy the bill provided was resort to the federal courts. H.R. 320 offered individuals civil and criminal remedies for the protection of their constitutional right to life and liberty.[39]

In defending congressional authority to enact H.R. 320, Representative Jeremiah Wilson (R.-Ind.) argued that the Fourteenth Amendment imposed an affirmative duty on

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[37] *Id.*, at 448 (April 4, 1871) (statement of Rep. Butler).

[38] *Id.*, at 475 (April 4, 1871) (statement of Rep. Dawes).

[39] *Id.*, at 476.

the states to guarantee to every person within their respective jurisdictions the equal protection of the law.[40] Should a state fail to meet its responsibility, Congress had ample remedial power (under § 5 of the Fourteenth Amendment) to redress constitutional wrongs. Finally, on April 6th, Representative Legrand Perce (R.-Miss.) posed the central remedial problem confronting the House. "The question before the House," Perce asked rhetorically, "is whether life and property and liberty are secure in the eleven States formerly rebellious."[41]

Throughout the House debates concerning the scope of § 1 several lessons are clear. The proponents of H.R. 320 believed that the Constitution provided for the protection of life, liberty, and property. The bill's advocates assumed that Congress had adequate authorty under the Fourteenth Amendment to secure these rights against state deprivations. And, most Republican representatives who addressed the issue based their views of constitutional rights on natural-rights theory rather than the laissez-faire ideology that the Court later imported into the Constitution.

In the Senate § 1 of H.R. 320 received even less attention than it had in the House of Representatives. Four days after the Senate began consideration of the bill, on April 11th, Senator George Edmunds (R.-Vt.), the Republican floor manager, observed that the President could employ military power (under § 3) if, as a matter of fact, unlawful conspiracies or insurrections had prevented a

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[40] *Id.*, at 482 (April 5, 1871) (statement of Rep. Wilson).

[41] *Id.*, at 512 (April 6, 1871) (statement of Rep. Perce).

state's authorities from enforcing state and federal law and had denied to "portions and classes of the people of a State of their constitutional rights of life, liberty, and property, and the protection of the laws[.]"[42] Although § 3 refers to conspiracies, insurrections, and domestic violence, and authorizes the President to employ military force, the debate provides a gloss for the rights that § 1 defines. In his introductory remarks, Senator Edmunds also observed that § 1 of H.R. 320 merely carried out "the principles of the civil rights bill [of 1866], which have since become a part of the Constitution."[43] According to Senator Edmunds, § 1 provided civil remedies for state actions that deprive citizens of their rights to due process and equal protection.[44]

During a colloquy with Senators Carl Schurz (R.-Mo.) and Lyman Trumbull (R.-Ill.), on April 14th, Edmunds further articulated his views on the scope of § 1. Claiming that H.R. 320 was within the clear scope of constitutional authority,[45] Senator Edmunds stated that the legislative objective was to "preserve the liberties and the rights of its citizens[.]"[46] Like most moderate Republicans, Edmunds argued that the Fourteenth Amendment simply overcame the limitations of *Barron v. Baltimore* and prohibited the states "from depriving a man of life, liberty, or property without due process of law[.]"[47] The proposed legislation

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[42] *Id.*, at 567 (April 11, 1871) (statement of Sen. Edmunds).

[43] *Id.*, at 568.

[44] *Id.*

[45] *Id.*, at 691 (April 14, 1871) (statement of Sen. Edmunds).

[46] *Id.*

[47] *Id.*, at 693.

merely enforced the Fourteenth Amendment's promise of due process and equal protection against state interference. While Matthew Carpenter (R.-Wisc.) shared Edmunds' views,[48] Senator Charles Sumner (R.-Mass.) implied that the Fourteenth Amendment embodied the principles of the Declaration of Independence.[49] However, Sumner (a radical Republican) failed to specify which principles he meant. Given his natural-rights philosophy, one can speculate that he meant the Declaration's inalienable rights of life, liberty, and the pursuit of happiness, but the record is silent.

Opponents of H.R. 320, including Trumbull and Garrett Davis (D.-Ky.), attacked the bill as a usurpation of the states' authority to protect the citizen's rights. Trumbull denied that the national government had constitutional authority to protect the individual's "personal rights of person and property."[50] Since the Fourteenth Amendment had not extended "the rights and privileges of citizenship one iota[,]" Trumbull noted, there was no authority for legislation creating new substantive rights. The federal government only had authority to prevent the states from depriving persons of life, liberty, and property without due process of law.[51] During the same debate Senator Davis expressed similar views, adding that the pur-

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[48] *Id.*, at 577 (April 11, 1871) (statement of Sen. Carpenter).

[49] *Id.*, at 651 (April 13, 1871) (statement of Sen. Sumner).

[50] *Id.*, at 575 (April 11, 1871) (statement of Sen. Trumbull).

[51] *Id.*, at 576, 577, 578, 579.

pose of the Fourteenth Amendment (§ 1) was to "abolish discriminations."[52]

Apparently, the radicals were less persuasive in the Senate than in the House of Representatives. The Senators who favored H.R. 320 took a more limited view of the rights that § 1 protected than their cohorts in the House. The bill's opponents delivered a jeremiad, claiming that the it would confer new, wholly unanticipated and unwarranted substantive rights, would transform the American federal system, and would convert the states into provinces of a centralized empire. In sum, the House and Senate debates indicate the absence of a consensus on the scope and nature of the rights that the Fourteenth Amendment conferred and that the proposed legislation enforced. While radical Republicans and Democrats argued that the proposed legislation created new and wholly unwarranted substantive rights, moderate and conservative Republicans portrayed H.R. 320 as a procedural measure that the Fourteenth Amendment authorized. The lack of consensus on § 1 of the Fourteenth Amendment and § 1 of the Enforcement Act of 1871 has given the Court considerable opportunity and latitude to provide both substantive and procedural meaning to the evolving American concept of constitutional due process.

While there was a lack of consensus among the bill's proponents concerning the scope and meaning of due-process rights, they shared the belief that the proposed Enforcement Act would create civil liability for inaction (i.e., the state's failure to enforce due-process rights) as

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[52] *Id.*, at 648 (April 13, 1871) (statement of Sen. Davis).

well as action (i.e., active deprivation of such rights). Indeed, the 42nd Congress legislated in the context of the southern states' failure to enforce the Freedman's newly secured right to due process and equal protection. The Enforcement Act's proponents also intended to secure the constitutional rights of loyal Whites as well as Blacks who had been subjected to private violence while state, county, and municipal authorities failed, refused, or were unable to suppress the Ku Klux Klan and other conspiracies. At least sixteen members of Congress specifically addressed the issue of state inaction and one, Ben Butler, expressly stated the belief that the Fourteenth Amendment imposes an affirmative duty on the states to enforce the individual's right to due process and equal protection.

On March 29th, the day after the Select Committee reported H.R. 320, Representative George Hoar (R.-Mass.) confronted the state's failure to meet their affirmative duty. Referring to the Equal Protection Clause of the Fourteenth Amendment, Hoar noted:

> Now, sir, what does the Constitution mean when it authorizes Congress to interfere by "appropriate legislation" in the case of the denial by a State to any person within its jurisdiction of the protection of the laws? If it had been the purpose of the American people, in accepting this article, to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights, that last clause would have been unnecessary, because the preceding part had provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But the provision goes on to say that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

> Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection.[53]

Although Hoar addressed the Equal Protection Clause, his remarks are applicable to the parallel, negative construction of the Due Process Clause.

Examining the bill as a whole, on March 31st, Mr. Sheldon (R.-La.) found it unthinkable that Congress lacked the power to enact remedial legislation in the event that the states fail to protect life, liberty, or property. "Shall it be said," Sheldon observed,

> that the citizen may be wrongfully deprived of his life, liberty, and property in his own country and at his own homestead, and the national arm cannot be extended to him because there is a State government whose duty it is to afford him redress, but refuses or neglects to discharge that duty?[54]

The very next speaker, Mr. Monroe (R.-La.), echoed Sheldon's view. Posing the question rhetorically, Monroe queried,

> In case life and liberty are insecure in any State, and that State virtually denies the necessary protection, are we still to be told that even now the Constitution does not confer upon Congress sufficient power to provide for this emergency?[55]

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[53] *Id.*, at 334 (March 29, 1871) (statement of Rep. Hoar).

[54] *Id.*, at 368 (March 31, 1871) (statement of Rep. Sheldon).

[55] *Id.*, at 370 (March 31, 1871) (statement of Rep. Monroe).

A short time later, Representative Lowe (R.-Kan.) argued that the Fourteenth Amendment would have no "practical operation and effect,"[56] if Congress could not secure the person's constitutional rights in the face of state inaction:

> What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
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> The argument leads to the deduction that while the first section of the amendment prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. . . . Such a position, Mr. Speaker, defeats itself by its own absurdities.[57]

Later in the debates, on April 3rd and April 4th, several of the bill's proponents again confronted the issue of the states' failure to protect the individual's constitutional rights. Representative Ellis Roberts (R.-N.Y.) argued that government's highest duty is to protect the citizen's rights. Roberts emphasized:

> And there are ethics which underlie and inspire and interpret constitutions. Obligations are mutual. Allegiance presupposes protection. The chief sovereignty guaranties that, and failure anywhere it must correct. Nothing can so weaken the life of a Government

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[56] *Id.*, at 375 (March 31, 1871) (statement of Rep. Lowe).

[57] *Id.*

as even to seem to neglect its citizens. No higher duty can exist than to protect them. Be they white or black, they must have free speech, a free ballot, and a safe home.[58]

Referring to § 3 of H.R. 320, Representative Beatty (R.-Ohio) stressed Congress' affirmative duty to remedy the failure of state authorities to protect the individual's rights:

> The State, from lack of power or inclination, practically denied the equal protection of the law to these persons. It is to remedy this evil and cover these proscribed and outraged citizens with the shield of the Constitution that we propose to authorize the President to send military aid to the local authorities in these lawless sections.
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> [A]dmit for the sake of argument that the number of these outrages is exaggerated, that the rights of but one citizen have been stricken down, and that the State wherein the offense was committed has by reason of indifference or lack of power failed to redress his wrongs[.] . . . [W]hat should we do? . . . Shall the Government abandon him [the outraged citizen] in the time of his danger? Does it owe him nothing? Shall it not interfere for his protection? Surely, if it fails to do so it is unworthy [of] the name of a Government.[59]

In a lengthy Philippic, on April 4th, Ben Butler (R.-Mass.) argued that Congress has an affirmative duty to

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[58] *Id.*, at 414 (April 3, 1871) (statement of Rep. Roberts).

[59] *Id.*, at 428, 429 (April 3, 1871) (statement of Rep. Beatty).

protect the individual's constitutional rights in the event that a state fails or neglects to do so:

> If the Federal Government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States, why were guarantees of those fundamental rights put in the Constitution at all, and especially by acts of amendment?
>
> All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself?
>
> Is it one of the rights of a State not to protect its citizens in the enjoyment of life, liberty, and property, and thereby deny him the equal protection of the laws, so that, when the General Government attempts to do for the protection of the citizen what the State has failed to do, it is to be held an interference with the rights of the State?[60]

Shortly thereafter, Representative John Coburn reiterated Butler's argument:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. . . . This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard

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[60] *Id.*, at 448 (April 4, 1871) (statement of Rep. Butler).

> the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen.[61]

Although several other representatives articulated similar views of congressional authority (under § 5 of the Fourteenth Amendment) and the legislative intent of H.R. 320, on April 5th, Representative Jeremiah Wilson (R.-Ind.) offered the most cogent explanation of Congress' constitutional authority to remedy deprivations of individual rights resulting from state inaction. Referring to the Equal Protection Clause, Wilson commented:

> [W]hen it is provided that no State shall deny to any person the equal protection of the laws it certainly is meant and it is equivalent to a provision that all citizens shall be equally protected. The word "deny," therefore, as used here, must be construed with reference to the spirit of the whole instrument. It is equivalent to the phrase "fail or refuse to provide for," and the true construction of the provision is: "No State shall fail or refuse to provide for the equal protection of the laws to all persons within its jurisdiction."[62]

If the states deny equal protection, Wilson concluded, Congress has power under § 5 of the Fourteenth Amendment to enforce the equal protection of the laws.

Unlike the House debates, the Senate's consideration of H.R. 320 does not further illuminate its author's original understanding. Only two of the bill's advocates, Senators Edmunds (the floor manager) and John Pool (Whig-N.C.), expressed their views on the states' failure to en-

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[61] *Id.*, at 459 (April 4, 1871) (statement of Rep. Coburn).

[62] *Id.*, at 482, 483 (April 5, 1871) (statement of Rep. Wilson).

force the right to due process and equal protection. Regarding equal protection, Pool had no doubt that "[w]here any State, by commission or omission, denies this right to the protection of the laws, Congress may, by appropriate legislation, enforce and maintain it."[63] Pool also assumed that the states have an obligation to enforce the right to personal liberty and security:

> The protection of the laws can hardly be denied except by failure to execute them. . . . Rights conferred by laws are worthless unless the laws be executed. The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.[64]

Later in the debate, on April 14th, Senator Edmunds asserted that for eight-hundred years, since Magna Charta, government had had an obligation to protect the citizen's rights and liberties. Edmunds argued that this governmental duty is affirmative rather than "a mere denial of the right of a State to interfere with life, liberty, and property, and to prevent due redress."[65] Obviously referring to the Fourteenth Amendment, Edmunds concluded that the national government has the power to protect citizens should the local authorities of a state tolerate or knowingly wink at deprivations of the citizen's rights.[66] Sen-

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[63] *Id.*, at 608 (April 12, 1871) (statement of Sen. Pool).

[64] *Id.*

[65] *Id.*, at 697 (April 14, 1871) (statement of Sen. Edmunds).

[66] *Id.*, at 697, 698.

ators George Vickers (D.-Md.) and Allen Thurman (D.-Ohio), who opposed H.R. 320, conceded that the bill was predicated on the assumption that the states had failed to act.[67] However, they rejected the proposition that the Fourteenth Amendment authorized Congress to remedy state legislative inaction. Vickers and Thurman also opposed the measure as an invasion of the states' internal affairs.[68]

The House and Senate debates on H.R. 320 yield four important propositions concerning the state-action doctrine. First, the bill's proponents believed that the Framers of the Fourteenth Amendment contemplated state inaction as well as state action depriving individuals of their constitutional rights. Second, both the states and the national government have an affirmative duty or obligation to protect citizens in the enjoyment of their constitutional rights. Third, when the states fail to act, Congress has ample authority under § 5 of the Fourteenth Amendment to take affirmative action. Fourth, H.R. 320 was intended to remedy the states' failure to protect all persons in the enjoyment of their constitutional rights.

If the authors of the Enforcement Act of 1871 contemplated inaction (omission) as well as state action, what forms of inaction did they comprehend? From the Senate and House debates (*supra.*), it is possible to discern several forms of inaction for which they created civil liability. First, they understood inaction to include the refusal of a

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[67] *Id.*, at 661 (April 13, 1871) (statement of Sen. Vickers), 772 (April 18, 1871) (statement of Sen. Thurman).

[68] *Id.*

state and its agents to act or protect persons in the enjoyment of their constitutional rights. Second, they contemplated the knowing or illicit wink, i.e., a state authority's knowing tolerance and/or acceptance of private deprivation of rights. Third, they comprehended a state's passivity, i.e., its unexplained or inexplicable failure to intervene even when its authorities know of private deprivations of life, liberty, or property. Fourth, they were aware of the state's inability to act in the face of riotous conduct, but provided for military action rather than municipal corporate liability to redress harms arising from riotous conduct. As this analysis of the legislative history of 42 U.S.C. § 1983 suggests, the Court should develop standards of constitutional liability that comprehend the failure of a state or its agents to secure the person's right to life, liberty, and property rather than insinuate standards of tort liability into the Fourteenth Amendment.